IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Civil Appln.No.2397 of 2007
in
Writ Petition No.5289 of 1989

Zaverchand Anand Shah ..Petitioner
(Original Defendant)

versus

Kishorkumar Motumal Chandvani ..Respondent.
(Original Plaintiff)

Mr.S.G.Surana for the Appellant
Mr.N.V.Bandivadekar for the Respondent.

Coram : S.R.Sathe, J.
Dated : 28th Sept., 2007

P.C.

1. Petitioner, the Original defendant in Civil Suit No.551 of 1982 has preferred this application for setting aside the order whereby the Writ Petition was dismissed for default on 20.3.2006.

2. Brief facts giving rise to this application are as under:

. The suit shed admeasuring about 1440 sq.ft. situated at House No.191 Bhivandi is owned by the present respondent- the original plaintiff. He filed suit for eviction against the present applicant/tenant in the Court of CJJD, Bhivandi. The said suit was decreed by the CJJD, Bhivandi on

20.10.1986. The defendant i.e. the present applicant filed Civil Appeal No.102 of 1987. However, the same was also dismissed on 20.11.1989 and decree for possession was confirmed. Being aggrieved by the same, the defendant filed Writ Petition No.5289 of 1989.

3. It is the case of the applicant, original defendant that the aforesaid Writ Petition was placed for hearing and final disposal before this Court in the month of March 2006. The Petitioner was under the bonafide impression that the petitioner's advocate will appear at that time and therefore the petitioner i.e. the present applicant was not present on the date when the aforesaid Writ Petition was called out for hearing and final disposal. According to the Petitioner, as at the time of hearing the petitioner and his advocate were absent, the petition was dismissed for default on 20.3.2006. It is his case that in July 2007 he received notice in the Darkhast Proceeding initiated by the present respondent landlord and at that time he came to know that his Writ Petition has been dismissed for default. Hence, he filed the present application on 25.8.2007 for setting aside the order regarding dismissal and restoration of the Writ

Petition.

4. The application is strongly opposed by the respondent. The respondent in his affidavit has contended that earlier also this Writ Petition was dismissed for default and then again it was restored. According to him the petitioner was in fact not interested in the Writ Petition and was aware that he had lost his case in the trial Court as well as in the Appellate Court and there was no chance for him to succeed in the writ petition and hence, only with a view to protract the matter and to harass the landlord, the petitioner pursued with the Writ Petition but remained absent without any sufficient cause. When the matter was called for hearing, the respondent landlord also contended that there was delay on the part of the applicant in filing the present application and there is no application made for condonation of delay. The respondent, therefore prayed for dismissal of the application.

5. Shri Surana, learned Advocate for the defendant tenant strongly argued before me that in the instant case the defendant had opposed the suit with a view to protect the possession of the

tenanted premises. He had also filed appeal, so the defendant/tenant was all along interested in protecting his possession. He, therefore, submitted that on the date of hearing as the petitioner was absent and his advocate also could not attend the court, the matter was dismissed. He submitted that if the Writ Petition is not restored the applicant tenant would suffer irreparable loss. He, therefore, submitted that the applicant can be directed to pay costs to the respondent and the Writ Petition be restored. As against this, Shri Bandiwadekar, learned Advocate for the Respondent landlord submitted that the tenant had lost his case in two courts and as such he was in fact not interested in prosecuting the writ petition. It is only with a view to harass the landlord, he filed the present Writ Petition. According to him, on previous occasion also the Writ Petition was dismissed for default, so the petitioner was in fact not vigilant in prosecuting the petition. He, therefore, submitted that the application be dismissed.

6. It is needless to say that when the application is filed by the plaintiff or the petitioner to set aside the order with regard to

dismissal of the petition for default, it is necessary for the applicant to show that there was sufficient cause for him to remain absent when the matter was called for hearing. In the instant case, if we carefully read the application in question then it is very clear that it is not at all the case of the petitioner that he was not aware of the date of hearing. All that he has stated is that as he had engaged advocate he presumed that the advocate will appear on the date of hearing i.e. 20.3.2006. If such is the position then it must be presumed that at least soon after the date of hearing i.e. after 20.3.2006, the petitioner would make query with his advocate regarding the progress of the matter to get himself acquainted as to what happened on the date of hearing. However, it is not the case of the Petitioner that accordingly he tried to collect the information from his advocate, but his advocate did not give the said information. Incidently, it must be mentioned that the applicant has also not come out with a clear case that he was not knowing the date of hearing and as such there was no question for him to appear on 20.3.2006 and his advocate could not attend the matter and there was in fact sufficient cause for his advocate for not attending the matter. He should have come out

with a clean case that the fault was in fact on the part of the advocate and he should not be required to suffer for the fault of the advocate. If the petitioner would have come with such case, it would have been a different thing. But the petitioner has stated in his application as under:

> "Petitioner says that the aforesaid Writ Petition was placed for hearing and final disposal before this Honourable Court in the month of March 2006. The Petitioner, therefore, was under bonafide impression that the petitioner's advocate will appear at that time and therefore the petitioner was not present on the date when aforesaid Writ Petition was called out for hearing and final disposal"

. Incidently, it must also be noted here that the petitioner has not filed an affidavit of his advocate to point out that there was fault on his part or due to some justifiable cause he could not remain present. If such material would have been placed on record then perhaps the petitioner could have argued that there is justifiable cause for remaining the petitioner or his advocate absent when

the matter was called.

7. I am fully conscious of the fact that as far as possible it is always desirable to have the decision of the matter on merits. I am also aware that it is often said that the approach of the court in dealing with such applications and application for condonation of delay be pragmatic. However, in the instant case, one has to bear in mind that this is not the first time when the petition was dismissed for default. Record clearly goes to show that this petition was also dismissed for default on 13.2.2003, but subsequently it was restored. So, from this circumstance one can say that here is a case where the petitioner was in fact not vigilant and there was negligence on the part of the petitioner to attend the date of hearing or to keep track of the proceeding. As he was totally negligent, he has averred that he came to know about the dismissal of the petition for the first time when he received notice issued in execution proceeding. So, in my opinion, this is not a fit case where leniency can be shown to the petitioner and it should be held that there was sufficient cause for the petitioner to remain present on the date of hearing. We cannot ignore the fact that the

suit for eviction was filed in the year 1982. The respondent landlord got the decree for possession in 1986. The said decree was confirmed by District Court and inspite of the same, even after 25 years of filing of the suit, the landlord is not in position to get the fruits of the decree. If in such type of cases very lenient and sympathetic view is taken then it would in fact cause great injustice to the other side who has in fact acquired decree on merits. Allowing the application for restoration under such circumstances at such stage in my opinion would in fact amount to abuse of process of law. So, under such circumstances, I hold that the facts and circumstances and the material on record do not warrant setting aside the order of dismissal for default and restoration of the petition. Hence, the application is dismissed with costs.

(S.R.Sathe, J.)